STATE OF MICHIGAN

COURT OF APPEALS

FLAGSTAR BANK,

Plaintiff-Appellant,

v

HARBOR NORTHWESTERN – 30800 and CRAIG SCHUBINER,

Defendants-Appellees.

UNPUBLISHED
April 13, 2006

No. 266198
Oakland Circuit Court
LC No. 2004-059612-CK

Before: White, P.J., Whitbeck, C.J. and Davis, J.

PER CURIAM.

Plaintiff appeals of right orders granting defendants summary disposition and an order denying plaintiff leave to amend its pleadings. This case arose out of a commercial lease agreement that the parties entered into. The trial court found that the parties' contracts did not afford plaintiff a remedy under the circumstances. We affirm in part and reverse in part.

Defendants purchased several buildings in 1999 and inherited both plaintiff and Comerica Bank as tenants in different buildings. On June 11, 1999, while defendants "had the building under contract," Comerica hand delivered a letter to Schubiner, Northwestern's sole owner, expressing its desire to exercise a renewal provision in its lease, and Schubiner hand wrote "acknowledged and accepted" on the letter and signed it. Meanwhile, plaintiff desired to vacate its premises and move, but failed to notify defendants in time to end their lease. Plaintiff did not want to continue paying rent at that location. To settle that dispute, plaintiff and defendants negotiated the documents at issue in this case. On November 6, 2000, plaintiff Flagstar and defendant Northwestern entered into two contracts consisting of an "agreement" and a "lease agreement" for the premises occupied by and leased to Comerica. In relevant part, the Agreement states:

> 2. . . . Northwestern 30800 confirms and warrants that the Comerica Lease expires without right of renewal for any reason on October 31, 2004, and that Northwestern-30800 or any other affiliated party or assignee will not do anything in the future to renew the lease with Comerica or interfere with Flagstar's lease rights. . . . In the remote event that Comerica refuses to vacate or holds over, Northwestern-30800 will do all things necessary to regain possession and deliver the Comerica premises to Flagstar forthwith. . . .

* * *

7. Telegraph-2550, Northwestern-30800, and Bloomfield Park understand that the components to this Agreement have a tangible value to Flagstar, and Flagstar shall be entitled to liquidated damages in the event of a material breach of this Agreement, including interest at 12% per annum commencing on the date of such breach, as follows: (A) If Northwestern-30800 fails to deliver the Comerica Premises to Flagstar as provided in Section 2 of this Agreement, then Flagstar shall be entitled to $250,000.00 in liquidated damages; . . . Notwithstanding the foregoing, this damages provision shall not apply in the event that Comerica shall fail to vacate the Comerica Premises at the expiration of the Comerica Lease on October 31, 2004. . . . Due to the difficulty in ascertaining Flagstar's damages in the event of a default, the parties hereto agree that the liquidated damages described in this Section 7 shall be Flagstar's sole remedy in the event of default by Telegraph-2550, Northwestern-30800, or Bloomfield Park.

* * *

9. This Agreement has been drafted with the participation of both parties and with the advice of counsel, and it shall not be construed against either party hereto.

10. This Agreement shall be binding upon the parties' successors and/or assigns.

Three days later, defendants drafted and sent a letter to Comerica advising Comerica that the lease expired on October 31, 2004, that defendants were not interested in renewing the lease, and Comerica was expected to vacate by that time. Comerica filed suit seeking declaratory judgment confirming that it could exercise the last five-year option in its lease, entitling it to remain beyond October 31, 2004. That dispute was resolved by this Court as follows:

> [Comerica's] predecessor in interest leased premises from defendant's predecessor in interest in 1973. The original lease term was for fifteen years commencing November 1, 1974. The lease contained an option clause granting plaintiff the right to renew the lease for four successive five-year terms upon six months' notice by certified mail. [Comerica] timely exercised its option to renew in 1989 and 1994. [Comerica] did not timely exercise its option to renew in 1999 because it was trying to renegotiate the rent. It faxed defendant notice of its intent to renew the lease for a five-year term in June 1999 and defendant agreed to the renewal. The parties dispute whether the fourth option survived the late exercise of the third option.
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> Here, it is undisputed that [Comerica] did not exercise its option to renew the lease within the time period specified. Notice was due by April 30, 1999 and was not given until June 11, 1999. Therefore, defendant could have declined to renew the lease and [Comerica] would have lost all possessory interest in the

> premises when the lease term ended on October 31, 1999. But defendant did not decline to renew the lease. Rather, it accepted [Comerica's] late offer to renew the lease for a five-year term ending October 31, 2004. [*Comerica Bank v Harbor Northwestern-30800, LLC*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 241744).]

Therefore, pursuant to this Court's decision, Comerica did not vacate the premises on October 31, 2004, and instead Comerica is expected to remain until October 31, 2009.

Plaintiff sued for specific performance, breach of contract of the Agreement and the Lease Agreement, and misrepresentation. The trial court found that plaintiff's sole remedy in the event of a default by defendant was the liquidated damages section in ¶ 7 of the Agreement, and it found that under the circumstances defendants had not breached the Agreement. In the meantime, defendants sold the premises to another party pursuant to an agreement providing that defendants remained responsible for this litigation. Also pursuant to that agreement, defendants placed $250,000 into escrow for the sole purpose of satisfying any eventual judgment in plaintiff's interest. Plaintiff sought leave to file an amended complaint naming the new owners as defendants. The trial court denied the motion as futile. Plaintiff now appeals.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo as a question of law the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The fundamental goal is to honor the intent of the parties. *Id*., 473. We review de novo a trial court's ultimate decision in a suit for specific performance, but the trial court's underlying factual findings are reviewed for clear error. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We review for an abuse of discretion the trial court's decision whether to permit amendment of pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Plaintiff does not dispute the trial court's finding that defendants did not breach the contractual promise to refrain from doing "anything in the future to renew the lease with Comerica or interfere with Flagstar's lease rights." Plaintiff does not attempt to argue on appeal that it is entitled to specific performance. Therefore, these arguments are waived. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

There is no serious dispute that defendants' warranty "that the Comerica Lease expires without right of renewal for any reason on October 31, 2004," was untrue, irrespective of any party's fault. The Agreement explicitly states that plaintiff "shall be entitled to liquidated damages in the event of a material breach," which includes "fail[ing] to deliver the Comerica Premises to Flagstar as provided in Section 2." Section 2 of the Agreement contains defendants' warranty that the Comerica Lease expires on October 31, 2004. It also states that "Flagstar shall lease from Northwestern-30800 the Comerica Premises . . . upon the expiration of the Comerica Lease (the same currently set to expire October 31, 2004)." However, "[i]n the remote event that Comerica refuses to vacate or holds over, Northwestern-30800 will do all things necessary to regain possession and deliver the Comerica premises to Flagstar forthwith."

Defendants argue that the latter sentence is an escape provision in the event that the Comerica Lease was extended for an additional term. Defendants argue that "both parties were aware of the possibility that Comerica might argue that it had validly exercised its third option in order to have a right to renew its fourth option to extend its lease for another five years." However, the evidence in the record does not support this contention, nor does any part of the record explicitly or implicitly show that plaintiff was given copies of the Comerica correspondence. Schubiner testified that he did not believe at the time "that there was any possibility [Comerica] had a fourth option." He testified that defendants "didn't even think about sending" the letter to Comerica asking them to vacate until after the Agreement was signed, and the letter was only sent as a courtesy and to help ensure that Comerica would vacate on time. Thus, the representations defendants made in the Agreement reflected defendants' understanding of what the documents with Comerica said. Thomas Hammond, plaintiff's chairman, testified that he understood the sentence to mean that Comerica's lease had already expired, but there was a possibility that Comerica might need an additional month or two to move out fully. The evidence unequivocally shows that the parties' "meeting of the minds" did not contemplate the possibility that the Comerica Lease might be extended.

The only other rational interpretation is that the parties intended defendants to have an escape provision in case Comerica failed to move out in a timely manner or "held over." Schubiner admitted that "holding over" was a different situation from extending the lease. This is further supported by the exception placed in the Agreement's damages provision: "Notwithstanding the foregoing, this damages provision shall not apply in the event that Comerica shall fail to vacate the Comerica Premises at the expiration of the Comerica Lease on October 31, 2004." This provision simultaneously reinforces the parties' understandings that the Comerica Lease would expire on October 31, 2004, and that defendants would not be liable for Comerica's tardiness in moving out upon *the expiration on that date*. The Agreement contains a total of four references to the Comerica Lease expiring on October 31, 2004. Reading the Agreement as a whole, delivery of the premises at the expiration of the Comerica Lease and the October 31, 2004, expiration of that lease are inextricably joined.

Thus, defendants' failure to deliver the premises after the Comerica Lease failed to expire on the anticipated date constitutes a "material breach" under the Agreement. Further, the exception to the liquidated damages provision does not apply because Comerica did not fail to vacate the premises after its lease expired on October 31, 2004. Rather, Comerica's lease did not expire. Therefore, it is unnecessary to determine whether plaintiff is entitled to any other remedies. The Agreement clearly and unambiguously states that "the parties hereto agree that the liquidated damages described in this Section 7 shall be Flagstar's sole remedy in the event of default." Plaintiff is entitled to the provided $250,000 in liquidated damages but is not entitled to any other remedy under the parties' contracts.

Plaintiff argues that it is entitled to further damages for misrepresentation as a distinct tort claim. Plaintiff fails to show that defendants "owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). We will not search for authority on plaintiff's behalf to rationalize plaintiff's claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Additionally, our analysis shows that plaintiff cannot show all elements of any form of misrepresentation and therefore could not prevail in any event.

Plaintiff asks, in the alternative, that we remand to the trial court for addition of the new owners of the premises as parties to this suit. Absent a small number of exceptional circumstances, "a motion to amend ordinarily should be granted." *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). One of those exceptional circumstances is futility. *Id*. Plaintiff cannot seek specific performance, and plaintiff could not satisfy the elements of any misrepresentation claim against a party not involved in the relevant untrue statements. Defendants have agreed with the new owners to remain responsible for this litigation, and they have $250,000 in escrow for that purpose. Because plaintiff will receive satisfaction of the judgment to which it is entitled from defendants, we agree with the trial court's finding that amendment would be futile.

We reverse the trial court's finding that plaintiff is not entitled to the damages provided by the liquidated damages clause. The trial court is affirmed in all other respects.

/s/ Helene N.White
/s/ William C. Whitbeck
/s/ Alton T. Davis